

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 6

WCC No. 2013-3195

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LILA STARKEY

Petitioner

vs.

ACE AMERICAN INSURANCE CO.

Respondent/Insurer.

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

**Summary:** Petitioner alleges she injured her right foot in the course and scope of her employment with Shopko Stores in Valley County, Montana, and that she is entitled to medical and wage-loss benefits, attorney fees, and a penalty. Respondent argues that Petitioner's foot injury was incurred prior to the day she claimed she injured it at work and that she is not entitled to workers' compensation benefits.

**Held:** No legal dispute is involved in this matter as it is essentially a fact issue that hinges on witness credibility. The Court concluded Petitioner suffered a right-foot injury in the course and scope of her employment and is therefore entitled to medical benefits. However, the record reflects that Petitioner continued to work in her time-of-injury position until she voluntarily left to move out of state, so she is not entitled to wage-loss benefits. As Respondent did not act unreasonably in denying Petitioner's claim, Petitioner is not entitled to attorney fees, or a penalty.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-119.** Petitioner proved both an "injury" and an "accident" as defined in § 39-71-119, MCA, through her own testimony and the testimony of corroborating witnesses, that at a specific time on a specific day she twisted her foot on the slanted leg of a picnic table and exclaimed aloud in pain; she was observed using crutches and a motorized cart on succeeding days at work by two managers; and on her

first day off after the accident she sought medical treatment and was found on x-ray to have a fractured bone in her foot.

**Injury and Accident: Generally.** Petitioner proved both an “injury” and an “accident” as defined in § 39-71-119, MCA, through her own testimony and the testimony of corroborating witnesses, that at a specific time on a specific day she twisted her foot on the slanted leg of a picnic table and exclaimed aloud in pain; she was observed using crutches and a motorized cart on succeeding days at work by two managers; and on her first day off after the accident she sought medical treatment and was found on x-ray to have a fractured bone in her foot.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407.** Petitioner established that she suffered an injury by the objective medical findings of a fractured metatarsal. Respondent is liable for the injury that arose out of and in the course of her employment. Petitioner’s treating physician opined on a more-probable-than-not basis that Petitioner putting weight on the outside of her foot on a slanted table leg caused an inversion-type injury, resulting in a fractured metatarsal.

**Witnesses: Credibility.** Where Petitioner was a trusted employee and witnesses corroborated her testimony that she injured her foot on a picnic table at work, the Court found her credible, even though the store manager, a supervisor, and a co-worker testified that Petitioner had been limping prior to the incident at the table.

**Benefits: Temporary Total Disability Benefits.** Where the evidence demonstrates that Petitioner continued to work in her time-of-injury job, with accommodations by her employer, until she quit work when she broke up with her boyfriend and moved to Wyoming to live with her sister, Petitioner has presented no evidence that she suffered a wage loss due to her injury and is not entitled to wage loss benefits.

**Attorney Fees: Reasonableness of Insurers.** Given that Petitioner had a painful foot prior to her work-related injury and that her late reporting of her injury may have contributed to the testimony of several witnesses who claim to have seen her wrapping her foot and limping prior to her industrial accident, the insurer had a reasonable basis to question whether Petitioner had suffered an on-the-job injury and was not unreasonable in denying Petitioner’s claim.

¶ 1 Trial in this matter was held October 22, 2013, at Fisher Court Reporting, 2711 1st Avenue North, Billings, Montana. Petitioner Lila Starkey was present and represented by Patrick R. Sheehy. Respondent ACE American Insurance Co. (ACE American) was represented by Steven W. Jennings. Elaine Palmer, claims adjuster for Gallagher Bassett Services, Inc. (Gallagher Bassett), third-party adjuster for ACE American, was also present.

¶ 2 **Exhibits:** I admitted Exhibits 1 through 7 without objection. During the course of trial, Petitioner offered Exhibit 8, which I admitted without objection.

¶ 3 **Stipulations:** The parties stipulated that the 2011 version of the Workers' Compensation Act (WCA) applies to this case.

¶ 4 **Witnesses and Depositions:** The parties agreed that the depositions of Cameron L. Acor, D.P.M., Carol Kickland, Margaret Otterberg, Jeffrey Bense, and Danny Carr can be considered part of the record. Starkey was sworn and testified. Kickland, Otterberg, Bense, and Carr were sworn and testified via videoconference from Glasgow, Montana.

¶ 5 **Issues Presented:** The Pretrial Order sets forth the following issues:<sup>1</sup>

Issue One: Did Petitioner suffer an injury arising out of and in the course of employment with Shopko Stores (Shopko) in Valley County, Montana?

Issue Two: Is insurer liable for payment of workers' compensation benefits, including medical and wage benefits (either temporary or otherwise) to the Petitioner going back to the date she ceased working due to her injury?

Issue Three: Is Petitioner entitled to the 20% penalty and attorney fees?

¶ 6 At the close of trial I issued a bench ruling pursuant to ARM 24.5.335.<sup>2</sup> The following findings of fact, conclusions of law, and judgment are in accordance with that ruling.

### **FINDINGS OF FACT**

¶ 7 Starkey testified at trial. I found Starkey to be a credible witness. Starkey left high school after her sophomore year and has worked ever since. She testified that she

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<sup>1</sup> Pretrial Order at 3, Docket Item No. 25.

<sup>2</sup> See Minute Book Hearing No. 4501, Docket Item No. 26.

worked in a variety of jobs, including nurse's assistant, truck driver, film developer, grocery clerk, bartender, secretary, car detailer, and began work in August 2012 stocking shelves at Shopko in Glasgow, Montana.<sup>3</sup>

¶ 8 Starkey testified that her job at Shopko evolved from a temporary position to a more permanent one when she was hired as the store's fashion supervisor. Starkey explained she also worked as a checker and at the time of her injury on October 31, 2012, she was being trained to be a key carrier so she could close the store one or two nights a week. Starkey testified that after her injury, she was eventually entrusted with closing the store, counting the day's receipts and locking them in a safe, and locking the store.

¶ 9 Starkey testified that she stopped working at Shopko on February 19, 2013, because her boyfriend was becoming belligerent with her and her 14-year-old son. Since Starkey could not support herself and her son with only her earnings from Shopko, she concluded she had to quit her job and move to Guernsey, Wyoming, where she now lives with her sister.<sup>4</sup>

¶ 10 Starkey testified that she started work around noon on the day of her injury, October 31, 2012. At 7:00 p.m., she and Kickland took a break outside the store at a picnic table.<sup>5</sup> The picnic table has six individual seats arrayed around it. When Starkey realized the seat closest to the building was too close to it for her to sit comfortably, she shifted to a seat to her left and in doing so, the outside of her right foot came down on the slanted table leg. Starkey said she put all of her weight on her right foot and fell to the seat, rolling her foot and feeling immediate pain in the outside middle of her foot.<sup>6</sup>

¶ 11 When she felt the pain, she exclaimed, "Ow!", and then explained to Kickland that she had been experiencing pain on the inside of her foot for about a week, but the new pain on the outside of her foot was completely different. The following day, Starkey stated she showed up for work with her foot wrapped. The store manager, Danny Carr, asked Starkey why she was limping and she explained that she hurt her foot on the picnic table the previous evening.<sup>7</sup>

¶ 12 Starkey testified that prior to hurting her foot on the picnic table, she had never come to work with her foot wrapped and never had trouble putting weight on her feet.

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<sup>3</sup> Trial Test.

<sup>4</sup> Trial Test.

<sup>5</sup> Trial Test.; Ex. 6 at 1.

<sup>6</sup> Trial Test.

<sup>7</sup> Trial Test.

However, the day after she injured her foot, she had trouble putting weight on her right foot and walked around on her heel. Starkey said her right foot was also swollen at the end of her eight-hour shift. Starkey testified that she worked another full shift the following day, then on her day off, November 3, 2012, she sought medical attention at the Indian Health Service - Fort Belknap Health Center (IHS).<sup>8</sup>

¶ 13 Starkey testified that she arrived at the IHS on crutches, as the pain had increased to the point that she needed crutches to help her move about and she could not put weight on her right foot any longer. She first saw a nurse, who placed a splint on her foot.<sup>9</sup> Bruising was noted on her right foot in the emergency room, and x-rays of her right foot confirmed a fracture of the fifth metatarsal bone.<sup>10</sup>

¶ 14 When she returned to work on Sunday, November 4, 2012, Starkey testified that Carr asked her why she was on crutches, and she explained that she had a broken bone in her foot. Starkey testified that she did not discuss with Carr filing a workers' compensation claim as she believed she was not eligible to file a claim since she did not immediately report her injury. Carr provided a cart for Starkey to drive while at work that day. In the evening, Starkey testified that she spoke with her mother who told her to file a workers' compensation claim for her foot, which she did the next day, November 5<sup>th</sup>.<sup>11</sup>

¶ 15 When she told Carr on November 5, 2012, that she was filing a workers' compensation claim for her injury, Starkey testified that Carr told her he would "fight her the whole way" on her claim. Starkey testified that she continued to work her regular shifts that week while trying to avoid putting weight on her right foot.<sup>12</sup>

¶ 16 On November 9, 2012, Starkey went back to the IHS and was seen by Richard Olson, M.D., who recommended that she be seen by a foot doctor.<sup>13</sup> On November 29, 2012, Starkey was seen by Cameron L. Acor, D.P.M., of the Northern Montana Medical Group in Havre, Montana, who put Starkey's foot in a cast and recommended that she put no weight on the foot and that she "return to work light duty."<sup>14</sup> The visit with Dr. Acor was pre-approved by Starkey's workers' compensation claims examiner.<sup>15</sup>

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<sup>8</sup> Trial Test.; Ex. 2 at 1-7.

<sup>9</sup> Trial Test.; Ex. 2 at 2.

<sup>10</sup> Trial Test.; Ex. 2 at 6-7.

<sup>11</sup> Trial Test.

<sup>12</sup> Trial Test.

<sup>13</sup> Trial Test.; Ex. 2 at 8.

<sup>14</sup> Trial Test.; Ex. 2 at 9-10.

<sup>15</sup> Trial Test.

¶ 17 Dr. Acor's medical note of Starkey's initial visit refers to her right-foot injury as "an inversion type of injury," with "a fracture of the base of the fifth metatarsal."<sup>16</sup> Dr. Acor's note of November 29, 2012, references: "5<sup>TH</sup> METATARSAL FX. INJURY OCCURED 11-31-12" [sic].<sup>17</sup>

¶ 18 Starkey followed up with Dr. Acor on December 21, 2012,<sup>18</sup> and January 11, 2013.<sup>19</sup> During the January visit, x-rays showed no healing of the fracture; consequently, Dr. Acor recommended a bone stimulator to assist in healing.<sup>20</sup> However, the workers' compensation carrier denied her claim and therefore Starkey did not get the stimulator until the end of February when she arranged to pay for it herself.<sup>21</sup>

¶ 19 Starkey saw Dr. Acor on February 25, 2013, before she moved to Wyoming. Dr. Acor's note of that date states that Starkey had been using the bone stimulator for a little less than a week. The note also indicates Starkey was moving to Wyoming and the doctor recommended that she follow-up with a physician there. Dr. Acor also recommended that Starkey remain non-weight-bearing on her right foot and to continue using her crutches and "cam boot."<sup>22</sup>

¶ 20 Starkey testified that in June 2013, she was reaching for her crutches upon exiting the shower and fell, resulting in increased pain in her right foot.<sup>23</sup> She went to the emergency room on June 6, 2013, where x-rays revealed a healing fracture of the fifth metatarsal bone. Starkey was discharged with pain medication and instructed to follow-up with an orthopedic physician in one to two weeks.<sup>24</sup>

¶ 21 An x-ray taken on June 6, 2013, was read by James Garland Hubbard, M.D., as showing "a scar identified in the proximal end of the fifth metatarsal, . . . consistent with an old screw."<sup>25</sup> However, Starkey testified that she had never had a screw placed in

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<sup>16</sup> Ex. 2 at 9.

<sup>17</sup> *Id.*

<sup>18</sup> Ex. 2 at 12-13.

<sup>19</sup> Ex. 2 at 14.

<sup>20</sup> *Id.*; Trial Test.

<sup>21</sup> Trial Test.; Starkey's claim was placed in a "controverted" status by letter from Gallagher Bassett claims examiner Cynthia Grooms on January 29, 2013 (Ex. 5 at 4), and ultimately denied by letter dated July 22, 2013 (Ex. 5 at 17).

<sup>22</sup> Ex. 2 at 24.

<sup>23</sup> Trial Test.

<sup>24</sup> Trial Test.; Ex. 2 at 34-36.

<sup>25</sup> Ex. 2 at 37.

her foot and had never fractured her foot prior to the incident of October 31, 2012, at Shopko.<sup>26</sup>

¶ 22 Starkey had an MRI taken on August 6, 2013, at the Memorial Hospital of Converse County in Douglas, Wyoming, that showed “increased signal intensity at the base of the fifth metatarsal bone consistent with a fracture.” The absence of edema was suggestive of a chronic injury.<sup>27</sup> Starkey had surgery scheduled on her foot in August, but her orthopedic surgeon, Mark G. Murphy, M.D., cancelled the surgery since he believed that her fracture was healing.<sup>28</sup>

¶ 23 Because Starkey’s foot pain was becoming unbearable, Dr. Murphy referred her to Matt Mitchell, M.D., a foot and ankle specialist at Casper Orthopaedic Assoc. PC.<sup>29</sup> On October 8, 2013, Starkey saw Dr. Mitchell. He recommended a CT scan, which was done the same day. As of the date of trial, Starkey was unsure what treatment Dr. Mitchell was going to recommend. Starkey testified that Dr. Mitchell told her the MRI shows non-union of the fracture while the CT scan shows healing. Starkey still cannot stand on her feet for long periods. She can stand about an hour before she needs to get off her feet.<sup>30</sup>

¶ 24 Starkey testified that she helps her sister with a motel her sister owns. Starkey explained that she receives no pay for her help, but does receive room and board from her sister so she helps out to earn her keep. Starkey clarified that prior to her foot injury of October 31, 2012, she had never come to work wearing an ACE bandage, she had never needed crutches, and she was able to bear weight on both feet up until that day and unable to do so afterwards.<sup>31</sup>

¶ 25 Danny Carr testified via videoconference from Glasgow, Montana. I found Carr to be a credible witness. Carr was the store manager at the time Starkey was hired, during the transition period when the store converted from Pamida, Incorporated to Shopko.<sup>32</sup> Carr recalled when Starkey left in the spring of 2013. Her reason for leaving,

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<sup>26</sup> Trial Test.

<sup>27</sup> Ex. 2 at 42.

<sup>28</sup> Trial Test.; Ex. 8 at 2.

<sup>29</sup> Trial Test.; Ex. 8 at 3.

<sup>30</sup> Trial Test.

<sup>31</sup> Trial Test.

<sup>32</sup> Trial Test.; Carr Dep. 10:23 - 11:5.

Carr recalled, was that Starkey was leaving her boyfriend and moving to Wyoming to be with her family there.<sup>33</sup>

¶ 26 Carr testified that he noticed Starkey had her foot wrapped in an ACE bandage and was noticeably limping about a week prior to her claiming to have suffered a work-related injury as a result of the incident with the picnic table.<sup>34</sup> Carr stated he did not take Starkey's claim about a work-related accident involving the picnic table seriously, as he believed she was joking about making a workers' compensation claim.<sup>35</sup>

¶ 27 Carr denied ever telling Starkey that he would "fight her all the way" on her claim for workers' compensation. Carr accommodated Starkey's inability to put weight on her right foot by letting her use a motorized riding cart in her duties. Carr testified that Starkey continued in her time-of-injury job until she quit.<sup>36</sup> He thought Starkey was a good employee, trustworthy, and got along well with people.<sup>37</sup>

¶ 28 Carol Kickland testified via videoconference from Glasgow. I found Kickland to be a credible witness. Kickland is an operations supervisor at Shopko in Glasgow and testified that she started working for Shopko when the store was making the transition from Pamida, Incorporated. Kickland explained that she knew Starkey and trained Starkey on some duties at the Shopko store.<sup>38</sup>

¶ 29 Kickland testified that on October 31, 2012, she took a cigarette break outside the Shopko store and saw Starkey sitting at the picnic table in the designated break area. After she joined Starkey, Kickland explained that she heard Starkey exclaim, "Ow" as Starkey rose to leave.<sup>39</sup> Kickland asked Starkey if she was alright, and Starkey explained that she had injured her foot about a week ago.<sup>40</sup> Kickland noticed that Starkey had a limp as she walked away, and used the wall of the building to support herself. Prior to that time, Kickland could not recall Starkey ever wearing an ACE bandage, using crutches, or having a limp while at work.<sup>41</sup>

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<sup>33</sup> Trial Test.; Carr Dep. 11:15-24.

<sup>34</sup> Trial Test.; Carr Dep. 13:22 - 15:18.

<sup>35</sup> Trial Test.; Carr Dep. 16:14 - 18:12.

<sup>36</sup> Trial Test.; Carr Dep. 27:24 - 28:8.

<sup>37</sup> Trial Test.; Carr Dep. 21:10-16.

<sup>38</sup> Trial Test.

<sup>39</sup> Trial Test.; Kickland Dep. 9:7-14, 12:5-13.

<sup>40</sup> Kickland Dep. 13:4-8.

<sup>41</sup> Trial Test.; Kickland Dep. 8:25 - 9:6, 18:9 - 20:1.



¶ 30 Margaret Otterberg testified via videoconference from Glasgow. I found Otterberg to be a credible witness. Otterberg worked with Starkey in the Glasgow Shopko store and was present with Jeffrey Bense one morning when Starkey came into the store limping. Bense asked Starkey what happened, and Otterberg testified that Starkey said her foot had been swollen for about a week. Starkey's foot was wrapped in an ACE bandage, and she could not tie her shoe. Otterberg testified that it was several days later when Starkey reported that she hurt her foot on the picnic table outside.<sup>42</sup> Otterberg testified that the conversation between Starkey and Bense occurred prior to the day Starkey hurt her foot on the picnic table.<sup>43</sup>

¶ 31 Otterberg testified that she was sure she saw Starkey limping prior to the day Starkey told her she injured her foot on the picnic table. Otterberg was only working part-time, three days a week, at the time.<sup>44</sup>

¶ 32 Jeffrey Bense testified via videoconference from Glasgow. I found Bense to be a credible witness. Bense recalls seeing Starkey limping into work one day while visiting with Otterberg at the front of the Glasgow Shopko store. Bense testified that Starkey told him she did not recall injuring her foot, but one of her feet was wrapped in an ACE bandage.<sup>45</sup>

¶ 33 Bense testified that Starkey was a good employee and trustworthy enough to close the store and deposit the cash in the safe on the evenings she closed.<sup>46</sup> Bense filled out the First Report of Injury and Occupational Disease on Starkey's claim and spoke with Carr and Kickland but not Starkey for the information needed to complete the form.<sup>47</sup>

¶ 34 On November 7, 2012, Bense spoke with claims adjuster Cindy Grooms about Starkey's workers' compensation claim. He reported to Grooms that Starkey came to work with a sore foot, went on break and hit her foot on a table, and that Starkey's foot had been hurting her for a week prior to the picnic table incident.<sup>48</sup> Bense admitted,

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<sup>42</sup> Trial Test.; Ex. 7 at 2.

<sup>43</sup> Trial Test.

<sup>44</sup> Trial Test.

<sup>45</sup> Trial Test.

<sup>46</sup> Trial Test.

<sup>47</sup> Bense Dep. 16:13 - 17:21; Ex. 1 at 1-2.

<sup>48</sup> Trial Test.; Ex. 4 at 6.

however, that it was not until after the picnic table incident that he saw Starkey walking about on crutches and requiring the use of the motorized cart to assist in her work.<sup>49</sup>

¶ 35 Cameron Acor, D.P.M., testified by deposition. Dr. Acor is a doctor of podiatry working at the Northern Montana Medical Group West in Havre, Montana.<sup>50</sup> Dr. Acor first saw Starkey on November 29, 2012, and took her history of an inversion-type injury to her foot from a table leg resulting in a fracture of the fifth metatarsal bone.<sup>51</sup> An inversion-type injury, Dr. Acor explained, is a turning of the foot “so that the outside edge of the foot is against the ground and the inside edge of the foot is up.”<sup>52</sup> Starkey did not report to Dr. Acor that she had any other injury to her foot other than the incident with the table leg that occurred on October 31, 2012.<sup>53</sup>

¶ 36 Dr. Acor testified that the type of fracture that Starkey has would make it difficult to bear weight on her foot.<sup>54</sup> Based upon Starkey’s history and the mechanism of her injury on the picnic table leg, Dr. Acor opined that it is more probable than not the picnic table incident on October 31, 2012, caused the fracture to Starkey’s foot.<sup>55</sup> The last time Dr. Acor saw Starkey was on February 25, 2012, at which time she still had a non-union of the fractured bone but had begun using the bone stimulator he had prescribed to assist in healing. If the bone stimulator did not bring the bone together, then, Dr. Acor testified, surgery would be next. Dr. Acor stated that until such time as the bone fracture healed, Starkey would not be at maximum medical improvement.<sup>56</sup>

### CONCLUSIONS OF LAW

¶ 37 This case is governed by the 2011 version of the WCA since that was the law in effect at the time of Starkey’s industrial accident.<sup>57</sup>

### **ISSUE ONE: Did Petitioner suffer an injury arising out of and in the course of employment with Shopko in Valley County, Montana?**

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<sup>49</sup> Bense Dep. 17:22 - 18:7.

<sup>50</sup> Acor Dep. 6:6 - 8:8.

<sup>51</sup> Acor Dep. 10:19 - 11:17; Ex. 2 at 9.

<sup>52</sup> Acor Dep. 18:15-20.

<sup>53</sup> Acor Dep. 11:25 - 12:6, 13:6-22, 25:17 - 26:5; Ex. 2 at 9, 12, 14.

<sup>54</sup> Acor Dep. 27:12-15.

<sup>55</sup> Acor Dep. 26:6 - 28:7, 33:15 - 34:9.

<sup>56</sup> Acor Dep. 24:7-9, 28:9 - 29:11, 33:3-10; Ex. 2 at 24.

<sup>57</sup> *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687; § 1-2-201, MCA.

¶ 38 The injured worker bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.<sup>58</sup>

¶ 39 Section 39-71-119, MCA, defines “injury” and “accident” in pertinent part as internal or external physical harm to the body that is established by objective medical findings caused by an unexpected traumatic incident or unusual strain identifiable by time and place of occurrence, by member or part of the body affected, and caused by a specific event on a single day or during a single work shift. In addition to establishing an injury by objective medical findings, an injured worker must also establish that it is more probable than not that the claimed injury occurred and arose out of and in the course of employment.<sup>59</sup>

¶ 40 I conclude that no real legal issue is involved in this case and that it is a factual dispute. As noted above, I found all of the witnesses who testified at trial to be credible. As I discussed with the parties during my bench ruling, I found some of the perceived inconsistencies between the various witnesses’ testimonies to be attributable to different recollections and/or perceptions of events as opposed to any effort on the part of any witnesses to mislead.

¶ 41 Starkey was a trusted Shopko employee, charged with collecting the day’s receipts one or two nights a week and locking the money in a safe, a duty she was given after she reported her injury. The injury was unexpected when Starkey put weight on her right foot, coming down on the angled leg of the picnic table in the employee’s designated break area. The incident caused Starkey to exclaim aloud in pain, as heard by fellow co-worker Kickland. Although Starkey had a painful right foot prior to this event, the pain was on the inside of her foot and she was able to put weight on it. After the October 31, 2012, incident, the pain was on the outside of Starkey’s right foot and she was unable to put weight on it without severe pain. Starkey required the use of a motorized cart and crutches in order to perform her duties. These facts were observed by both store manager Carr and assistant store manager Bense. Starkey sought medical attention on her first day off after the incident, and an x-ray of her right foot revealed the fractured fifth metatarsal.

¶ 42 Based on Starkey’s history before and after the incident of October 31, 2012, together with the mechanics of her foot coming down on the slanted table leg, Dr. Acor opined on a more-probable-than-not basis that the incident caused an inversion-type injury to Starkey’s foot resulting in the fractured metatarsal, satisfying Starkey’s burden

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<sup>58</sup> *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

<sup>59</sup> § 39-71-407(1) & (3)(a)(i), MCA.

of proof. I therefore conclude that Starkey suffered an injury arising out of and in the course of her employment with the Shopko store in Glasgow, Valley County, Montana.

**ISSUE TWO: Is the insurer liable for payment of workers' compensation benefits, including medical and wage benefits (either temporary or otherwise) to the Petitioner going back to the date she ceased working due to her injury?**

¶ 43 Section 39-71-704(1), MCA, states, in part:

(a) After the happening of a compensable injury or occupational disease and subject to other provisions of this chapter, the insurer shall furnish reasonable primary medical services, including prescription drugs for conditions that are a direct result of the compensable injury or occupational disease, for those periods specified in this section.

¶ 44 There is no question that Starkey incurred medical expenses related to care and treatment for the fractured bone in her right foot. Such expenses include but are not limited to doctor visits, x-rays, and the bone stimulator paid for by Starkey. Starkey is entitled to be reimbursed for these expenses, and to have ACE American pay for all reasonable and necessary future medical treatment to resolve the broken bone and related medical issues resulting from Starkey's injury of October 31, 2012.

¶ 45 The problem with this issue as presented to me is that Starkey did not stop working "due to her injury." The testimony in this case is that Starkey continued to work in her time-of-injury job, with accommodations provided by her employer to keep weight off of her right foot, until by her own admission she quit work in February 2013 because she had broken up with her boyfriend. Since Starkey could not support herself and her son on the wages from Shopko alone, Starkey chose to move to Wyoming to live with her sister who owns a motel there. In exchange for room and board, Starkey helps with her sister's motel business.

¶ 46 Because Starkey presented no evidence that she has suffered a wage loss due to her injury, I cannot conclude that she is entitled to wage-loss benefits at this time.

**Issue Three: Is Petitioner entitled to the 20% penalty and attorney fees?**

¶ 47 Pursuant to § 39-71-611, MCA, an insurer shall pay reasonable attorney fees if the insurer denies liability for a claim for compensation, the claim is later adjudged compensable by this Court, and this Court determines the insurer's actions in denying liability were unreasonable. Section 39-71-2907, MCA, provides that this Court may increase by 20% the full amount of benefits due a claimant during the period of delay or

refusal to pay, when an insurer unreasonably delays or refuses to pay benefits prior or subsequent to an order granting benefits from this Court.

¶ 48 As explained in *Marcott v. Louisiana Pac. Corp.*, the penalty statute “was never intended to eliminate the assertion of a legitimate defense to liability” and “the existence of a genuine doubt, from a legal standpoint, that any liability exists constitutes a legitimate excuse for denial of a claim or delay in making payments.”<sup>60</sup> In this case, even though Starkey explained that the pain in her foot that pre-dated her injury on Halloween 2012 was to a different part of her foot, the fact remains she did have a painful foot prior to her injury. Moreover, Starkey’s late reporting of her injury may have contributed to the testimony of several witnesses who claim they saw Starkey wrapping her foot and limping prior to the incident involving the picnic table. Given the facts presented, ACE American had a reasonable basis to question whether Starkey had indeed suffered an on-the-job injury. Therefore, ACE American was not unreasonable in denying Starkey’s claim and is not liable to Starkey for attorney fees or a penalty.

#### JUDGMENT

¶ 49 Petitioner suffered an injury arising out of and in the course of her employment with Shopko Stores in Valley County, Montana, when she suffered a fractured metatarsal bone in her right foot on October 31, 2012.

¶ 50 The Respondent is liable to Petitioner for medical care and treatment related to her right-foot injury.

¶ 51 Petitioner is not entitled to attorney fees or a penalty.

¶ 52 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 17<sup>th</sup> day of March, 2014.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Patrick R. Sheehy  
Steven W. Jennings  
Submitted: October 22, 2013

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<sup>60</sup> 275 Mont. 197, 205, 911 P.2d 1129, 1134 (1996). (Citations omitted.)